In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1437

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO, PETITIONER,

v.

CARRIER AIR CONDITIONING COMPANY

AND

NATIONAL LABOR RELATIONS BOARD, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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I N D E X

CITATIONS

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,

Petitioner,

v.

CARRIER AIR CONDITIONING COMPANY

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Sheet Metal Workers' International Association, Local 28, AFL-CIO, petitions for a writ of certiorari to review the judgment of the United States

Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, pp. 2a-30a) is reported at 547 F.2d 1178. The decision and order of the National Labor Relations Board (App. B, infra, pp. 31a-44a) is reported at 222 NLRB 727.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I.

Whether when the National Labor Relations Board has found that a union has not engaged in an unlawful secondary boycott because the union has not engaged in any unlawful conduct within the meaning of either subdivision (i) or (ii) of Section 8(b)(4)(B) of the National Labor Relations Act and has therefore expressly found it unnecessary to make findings on whether the object of the Union's conduct was secondary and unlawful, the court of appeals, upon

disagreeing with the Board on the lawfulness of the union's conduct, is required to remand to the Board for findings with respect to the lawfulness of the Union's object.

II.

Whether when an employer and a union enter into a collective bargaining agreement containing a "work preservation" clause and thereafter the employer enters into a business contract which requires him to violate that clause, a union violates Section 8(b)(4)(ii)(B) or Section 8(e) of the National Labor Relations Act when it files a grievance against the employer under the collective bargaining agreement in which it seeks only to hold the employer liable for the wages lost by employees as a consequence of the employer's breach of the collective bargaining agreement.

STATUTES INVOLVED

Section 8(b) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. 158(b) provides, in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in his clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

Section 8(e) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. 158(e), provides in relevant part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void:

* * *

STATEMENT OF THE CASE

A. The Board's Findings of Fact

Background

Sheet Metal Workers' International Association, Local 28, AFL-CIO ("Union") was party to a collective bargaining agreement with Sheet Metal and Air Conditioning Contractors National Associates, New York Chapter, Inc. ("SMACCNA") which contained a clause providing that certain enumerated work, including the manufacture, fabrication and installation of "plenums," shall be performed by sheet metal workers in the bargaining unit.[1] The collective bargaining

1. The clause is set forth in full in the Board's decision (App. B, infra, p. 34a).

agreement set forth remedies for violations of the agreement including the imposition of fines commensurate with the loss sustained by sheet metal workers.

A plenum is a four-sided sheet metal box which serves for the housing or receipt of air and noise abatement. In the New York area, the Union's members have traditionally fabricated and installed plenums on conventional air-conditioning units (App. B, infra, p. 35a).

At issue here are the plenums in moduline air-conditioning units manufactured by Carrier Air Conditioning Company ("Carrier"). Carrier began marketing its first moduline unit, Model 37P, in the New York metropolitan area in 1966. Later improvements led to the manufacture of Model 37A around 1970. Both of these units included plenums that were prefabricated and attached at Carrier's Tyler, Texas plant. Although numerous parts of each unit were patented, the plenum was not (id. at 35a). Commencing with Carrier's efforts in 1966 to market its moduline units in New York with prefabricated plenums attached, and continuing through the events in controversy in 1973-74, the Union insisted that the work of fabricating and installing the plenums was work that belonged to members of the New York bargaining unit.

The Alleged Violations

On June 5, 1973, the Union's executive board adopted a resolution that "no allowance be made in the c.b.a. [collective bargaining agreement] at all to allow the dual Moduline Mixing Box in the New York city area" (id. at 37a). This resolution was presented to and adopted by the general membership on June 21, 1973.

In early 1973, plans were prepared for the construction of the Van Etten Drug Treatment Center. The mechanical specifications called for the use of "variable volume linear air diffusers, Carrier Moduline or approved equal" (id. at 37a). The heating, ventilation, and air-conditioning contractor on the project, Acme Climate Control Corp., issued a purchase order for the Carrier 37A units pursuant to the specification and subcontracted certain sheet metal work, including the installation of the Carrier 37A units on the project, to Three Boro Sheet Metal and Ventilating Co., Inc. ("Three Boro"), who was by a separate agreement bound to the terms of the collective bargaining contract between the Union and SMACCNA.

On October 18, 1973, an erasure of the

Carrier Moduline units from the drawings of the Van Etten job was discovered. There was testimony that a sketcher employed by Three Boro and a member of the Union has erased the Carrier units from the drawings (id. at 38a). There was also testimony concerning a telephone conversation between Carrier and Union representatives concerning these events (ibid.). Based on these incidents, Carrier filed an unfair labor practice charge on October 25, 1973 alleging a violation of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. 158(b)(4)(i) and (ii)(B) (the "Act").

On November 13, 1973, Carrier spokesmen met with the Union's officials at which time the Union's President told the Carrier representatives that "he could not permit the unit to come in [to New York]" (id. at 39a). On December 27, 1973, Carrier filed a charge based on this conversation alleging a violation of Section 8(e) of the Act, 29 U.S.C. 158(e). However, the parties continued to attempt to resolve the dispute and the Union permitted Three Boro to install the Carrier units on the Van Etten job without further incident.

In January, 1974, Columbia Presbyterian Hospital entered into an agreement with H. Cohan

Contracting Corporation ("Cohan") to perform all the mechanical work on its Babies Hospital Addition in accordance with the building specifications prepared by architects and consulting engineers. The specifications called for the installation of Carrier's 37AF air terminal units, including plenums as fabricated by Carrier (id. at 39a). Cohan thereafter subcontracted certain sheet metal work on the project, including installation of the Carrier moduline units as specified, to General Sheet Metal, Inc. ("General"), a member of SMACCNA.

Meanwhile, in March, 1974, the President of the Union and Carrier tentatively agreed that the Union would accept Carrier's moduline units as factory fabricated in consideration for which Carrier would withdraw the instant unfair labor practice charges and promote the moduline units so as to provide additional sheet metal work. Effectuation of the tentative understanding was deferred due to a union election in which the President was unseated. On July 19, 1974, Carrier met with the newly elected Union President to discuss the proposed resolution at which time Carrier was told that the Union had decided to "insist that [Carrier] go along with the agreement as written" (id. at 39a).

The Union filed a grievance against General

under the SMACCNA agreement on November 7, 1974. It requested a hearing and determination of the Joint Adjustment Board ("JAB"), a body consisting of an equal number of representatives of the Union and of SMACCNA, established by the collective bargaining agreement for the purpose of resolving grievances arising out of the interpretation or enforcement of the contract (id. at 40a).

The Union proposed that General pay the sum of $2,153.60 to the Local 28 Sick Dues Relief Fund, which sum represented the loss of man hours caused by General's alleged violation (ibid.). Upon filing of this claim, General ceased the installation of the Carrier units at the Babies Hospital site. The work was, however, resumed when Carrier agreed to reimburse General for the amount claimed by the Union, thus obviating the necessity of a determination by the JAB.

The unfair labor practice complaint, as amended, alleged that by filing the grievance against General, the Union violated Sections 8(b)(4)(ii)(B) and 8(e) of the Act.

B. The Board's Decision

On these facts the Board found no violations of either Sections 8(b)(4)(B) or 8(e) and dismissed

the complaint in its entirety. The Board held that neither the June 21, 1973 resolution of the executive committee nor its presentation to the membership for adoption constituted inducement or encouragement of employees to refuse to perform services under Section 8(b)(4)(i)(B) (id. at 10a-11a). It also found the evidence insufficient to hold the Union responsible for inducing or encouraging any conduct of the sketcher on the Van Etten job (id. at 12a-13a).

The Board further found no violations of Section 8(b)(4)(ii)(B). It characterized the statements of Union officials on November 13, 1973 and July 19, 1974 as "no more than reiteration of [the Union's] position that it would not relinquish its rights under the collective-bargaining agreement" and thus they contained no threat to pursue those rights through other than lawful means (id. at 11a).

With respect to the Babies Hospital Addition, the Board, adhering to its prior decision in Associated General Contractors, 207 NLRB 698 (1973), reversed sub nom. Associated General Contractors v. N.L.R.B., 514 F.2d 433 (9th Cir. 1975), held that by filing a grievance against General the Union did not violate 8(b)(4)(ii)(B) and that the contract as so applied did not violate Section 8(e) (id. at 11a-12a):

> By instituting the grievance proceeding against General Sheet Metal, the Respondent merely 'sought to enforce certain provisions of [its] bargaining agreement against a party to that agreement through peaceful means provided by the agreement and by no other means.' As the Board stated in Associated General Contractors at 700:
>
> [A] contractual agreement, such as we have before us, for compensation of a breach of contract determined by contractually fair procedures is a reasonable and peaceful method of resolving a dispute. Consequently, we find the Union's use of its contract in its dispute with Ohland did not constitute statutorily proscribed threats, coercion, or restraint." (Footnote omitted.)

Finally, the Board concluded that having found that the Union:

> has not resorted to the coercive tactics proscribed by the Act, we find it unnecessary to reach the secondary-primary employer and work preservation issues on which the Administrative Law Judge passed. (id. at 13a).

C. The Court of Appeals' Decision

The court of appeals, in a 2 to 1 decision, affirmed the Board's order in part and reversed in part. The majority first analyzed the contract clause under Section 8(e) and concluded that the clause, as applied to moduline units, was not designed to preserve work for union members under National Woodwork Mfrs. Ass'n

v. N.L.R.B., 386 U.S. 612 (1967). It did so on the basis of its agreement with the Administrative Law Judge ("ALJ") that the moduline unit was a "new and different product" and therefore that "fabrication of the Moduline plenums 'is not work traditionally and historically performed by members of Local 28'" (App. A, infra, p. 18a). It rejected the Board's request for a remand should the court deem it necessary to reach this question (id. at 17a, footnote 9).

Judge Smith dissented from this part of the majority's opinion, writing that the "Board might well find that the plenum was not a new product but one within the competence and experience of the New York subcontractors and the members of Local 28" and that the "Board could therefore have found that the union's objective was preservation of work" (id. at 29a-30a). Since the Board had not reached this question, Judge Smith would have remanded to the Board for further findings.

The court then addressed the (i) and (ii) issues. It agreed with the Board that none of the Union's conduct violated (i) but disagreed with the Board's conclusions on (ii). It rejected the Board's "apparent position—that contractually based peaceful means of seeking a secondary end are legal" (id. at

25a). It conceded that judicial enforcement of the contract though "somewhat coercive" would not have been the kind of coercion Congress intended to make unlawful (id. at 24a-25a). After expressing doubt that even recourse to "bona-fide arbitration procedures" would be the equivalent of court enforcement, it held that because the grievance procedure here included an appeal to a Joint Adjustment Board composed of an equal number of employer and Union representatives, any similarity between court enforcement and arbitration was not present here because of the absence of a "neutral factfinder with no stake in the outcome of the dispute" (id. at 27a-28a). Therefore, the court concluded that both the Union's statements that it would not allow Carrier units into New York and its invocation of the grievance procedure were "threats, restraint and coercion" within the meaning of Section 8(b)(4)(ii)(B).

REASONS FOR GRANTING THE WRIT

1. With respect to Question I, the court of appeals, in determining the primary-secondary and work preservation issues in the absence of findings by the Board on these issues, has so far departed from the accepted and usual course of proceedings on review of the decision of an administrative agency as to call for an exercise of this Court's power of supervision.

Furthermore, in denying the Board's request for remand, the court of appeals decided an important question of federal law concerning the scope of the work preservation doctrine under National Woodwork without affording the Board an opportunity to decide the issue in the first instance.

(a) A Remand to the Board was Required

A violation of Section 8(b)(4)(B) of the Act requires findings both that a union has engaged in unlawful conduct under subsections (i) or (ii) and that an object of that conduct is one prohibited by that section. Here, the Board reversed the ALJ, found no unlawful conduct and thus found it unnecessary to reach the question of the lawfulness of the Union's object.

Most recently, this Court in N.L.R.B. v. Enterprise Ass'n, Local 638, ___ U.S. ___, 97 Sup. Ct. 891, 905 (1977) criticized the Court of Appeals for the District of Columbia Circuit for substituting its own view of the facts for those of the Board in determining whether a union's object in engaging in (i) and (ii) conduct was secondary and unlawful:

> The statutory standard under which the Court of Appeals was obliged to review this case was not whether the Court of Appeals would have arrived at the same result as the Board did, but whether the Board's findings were 'supported by substantial evidence on the record

considered as a whole.' 29 U.S.C. §160(e). It appears to us that in reweighing the facts and setting aside the Board's order, the Court of Appeals improperly substituted its own views of the facts for those of the Board." (Citations omitted.)

A fortiori, where, as here, the Board has made no findings concerning the lawfulness of the Union's object because in its view the Union did not engage in conduct violative of (i) or (ii) of Section 8(b)(4)(B) and the court of appeals disagrees, a remand for Board findings on the object of the Union's conduct is required.

The court rejected the Board's specific request for a remand on this issue on the ground that "additional findings would be of little assistance" and that the "ALJ's finding of fact, which were essentially accepted by the Board, show a pattern of secondary activity and a purpose other than work preservation" (App. A, infra, p. 17a, footnote 9). By so doing, the court abrogated a function that has historically been reserved to the Board in the first instance.

In support of its refusal to remand, the court erroneously cited Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 496 (1951) for the proposition that Board findings are entitled to "less value"

when the court has available the findings of the Board's hearing officer (ibid.). In Universal Camera, the Court held only that upon review of a Board decision under the "substantial evidence" rule, the report of the hearing officer is a part of the record that must be considered in applying that test. The Court noted that the "significance of his report, of course, depends largely on the importance of credibility in the particular case." 340 U.S. at 496. On the work preservation question, the credibility of witnesses was not at issue here; rather it was the weight to be given to conflicting facts from which different conclusions might be drawn. It is precisely that kind of inquiry to which the Court addressed itself in Enterprise and in which it reaffirmed the substantial deference that must be accorded to Board findings. See also N.L.R.B. v. Hearst Publications, Inc., 332 U.S. 111 (1944). In that context, the conclusions of the ALJ are entitled to little, if any, weight.[2]

Moreover, the court below erred in finding that the ALJ's findings of fact were "essentially accepted" by the Board. First, the Board in its opinion adopted the findings of the ALJ "only to the extent consistent herewith" (App. B, infra, p. 2a).

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2. It is anomalous that the court of appeals in the instant case affirmed the Board's reversal of

Second, the Board expressly declined to make any findings with respect to the questions essential to a determination of the lawfulness of the Union's object (id. at 13a). In several instances, the Board's statement of facts merely recited the contention of Carrier[3] without indicating whether it agreed with that contention and, if it would, what, if any, conclusions were properly to be drawn therefrom.

(cont.)

ALJ's findings that certain Union conduct was unlawful under (i).

3. With respect to the ability of Union members to perform the work in question, the Board merely stated:

> Carrier's position is that, due to the design of the moduline units, specially trained personnel working under the supervision of Carrier engineers and utilizing costly equipment are required to perform the work of mating the plenum to the control portions of the unit and the calibration and adjustments necessary to assure proper plenum and air flow. (App. B, infra, p. 5a).

And again, after reviewing prior efforts to have the plenum for the Carrier units fabricated in New York shops, the Board stated only:

> Carrier contends that the fabrication of the plenums in New York shops made the moduline units defective and uncompetitive in price, and consequently difficult to market (id. at 6a).

Under all these circumstances, the court's refusal to remand was manifest error.

(b) Important Federal Questions Are Involved in the Issues Not Decided by the Board

The facts of this case present an important question under the Act concerning the scope of the work preservation doctrine under National Woodwork. The ALJ, the Board and the court of appeals agreed that Union members have traditionally fabricated and installed plenums on conventional air-conditioning units. The ALJ found, however, that Carrier's moduline unit was a "new and different product" and that fabrication of the moduline plenums "is not work traditionally and historically performed by members of the Union"(App. A, infra, p. 18a). The Union excepted to this finding by the ALJ; it was neither reviewed by the Board nor did the Board express any views as to the conclusions which might be properly drawn from the finding. Neither the ALJ, the Board nor the court of appeals found that the plenum itself was a new product.

The precise parameters of the work preservation doctrine are still unsettled. In National Woodwork, the Court noted that it had "no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to

monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product " (386 U.S. at 630-31). See also concurring opinion of Mr. Justice Harlan, 386 U.S. at 648. The Board and at least one Circuit Court of Appeals have stated the work preservation question to be not only whether the precise work involved has been "traditionally performed" but whether it is "fairly claimable" by bargaining unit employees. Local 282, Int'l Brotherhood of Teamsters (D. Fortunato), 197 NLRB 673 (1970); Sheet Metal Workers Int'l Ass'n, Local 223 v. N.L.R.B., 498 F.2d 687, 693-96 (D.C. Cir. 1974); Meat and Highway Drivers Local 710 v. N.L.R.B., 335 F.2d 709, 716 (D.C. Cir. 1964); cf. American Boiler Mfrs. Ass'n v. N.L.R.B., 404 F.2d 547, 551 (8th Cir. 1968).

In applying this test, the Board has noted that to "define unit work narrowly according . . . to the newness of the product" would effectively deny a union "any remedy for piecemeal reduction and potential elimination of work unit opportunities." Retail Clerks Union, Local No. 648 (Brentwood Markets, Inc.), 171 NLRB 1018, 1020 n. 5 (1968). The D. C. Circuit has upheld a union claim to work on "substituting materials" for work traditionally performed. Local 433, United Brotherhood of Carpenters, 509 F.2d 447 (D.C. Cir. 1974). In National Woodwork, the Court rejected the employers' argument that work preservation clauses must give way to economic factors and

technological improvements. 386 U.S. at 644. Carrier's claim and the court's opinion below rest essentially on those factors, relative economies and alleged technological developments, all considerations rejected by the Court in National Woodwork.

Whether the court here rejected the "fairly claimable" test as inappropriate under National Woodwork or found it inapplicable on the facts cannot be determined from a reading of its decision. If the former, there is a conflict among the circuit courts on this issue. But in either event, the issue is certainly of sufficient importance that the views of the Board should have first been ascertained.

2. With respect to Question II, the court of appeals decided a significant federal question unanswered by the Court in Enterprise. Simply stated, that question is whether a union, prohibited under Enterprise from picketing to enforce a work preservation clause, is also precluded from asserting a claim for breach of that clause against the contracting employer pursuant to the grievance and arbitration machinery of the collective bargaining agreement. The court of appeals' decision on this issue is in conflict with important federal labor policies and at variance with those expressed by at least two other circuit courts.

The crucial facts here are that the Union filed a grievance against General based on General's consent to install Carrier moduline units with plenums attached in violation of the collective bargaining agreement. The Union requested as a remedy only that General pay into the Union's sick pay fund an amount equal to the time actually lost by its members as a consequence of General's breach. At no time did the Union interfere with General's performance of the work; at no time did it seek that General cease doing business with any other person. Nonetheless, the court of appeals determined that the filing of the grievance was (ii) conduct under Section 8(b)(4)(B) and that the collective bargaining agreement as applied, violated Section 8(e).

a. The Court's Decision is in Conflict with Federal Labor Policy in Favor of Grievance And Arbitration Procedures

The court's holding that utilization of contractually agreed upon methods of contract enforcement constitute a "threat, restraint or coercion" within the meaning of Section 8(b)(4)(ii)(B) flies in the face of provisions of the same Act expressly making "[f]inal adjustment by a method agreed upon by the parties . . . to be the desirable method for settlement of grievance disputes arising over the

application or interpretation of an existing collective bargaining agreement" (Section 203(d), 29 U.S.C. 173(d)). This policy "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960). Arbitration is "the substitute for industrial strife." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). The holding of the court below that utilization of agreed upon grievance machinery is a restraint or coercion is therefore "completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." Local 174, Int'l Brotherhood of Teamsters v. Lucas Flour Co., 369 U.S. 95, 105 (1962).

The court, after acknowledging that judicial enforcement of the contract would not be restraint or coercion and perhaps recognizing the incongruity[4]

4. It would indeed by difficult to explicate why collective bargaining agreements not containing means for resolving grievances should have a preferred position over those that do. Moreover, since recourse to the contractual machinery is a prerequisite to any action under Section 301 (see Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965)), judicial enforcement was not available to the Union here.

of a holding that arbitration is restraint and coercion, found that the contractual procedure here was not the equivalent of bona fide arbitration because the grievance procedure involved a board of 24 members, half from the Union, half from the subcontractor's association (App. A, infra, p. 27a-28a). While in fact the grievance procedure here provides for arbitration of disputes not settled by the Joint Adjustment Board, the Court has on several occasions upheld the enforceability of awards from such boards under Section 301 of the Act, 29 U.S.C. 185. See Humphrey v. Moore, 375 U.S. 349 (1964); General Drivers, Local 89 v. Riis & Co., 372 U.S. 517 (1963). Thus, the decision below is contrary to the clear mandate of national labor policy and the decisions of this court.

b. The Court's Decision is in Conflict with Decisions of Other Circuit Courts of Appeal

Assuming, arguendo, the existence of any circumstance under which resort to peaceful grievance and arbitration machinery would violate (ii), a necessary prerequisite to any 8(b)(4)(B) violation is a finding of a "cease doing business" object. N.L.R.B. v. Local 825, International Union of Operating Engineers, 400 U.S. 297 (1971). The precise issue in the Enterprise case was the question of whether, in the context of that case, an object of the union's

picketing of Hudik (the subcontractor and the party to the work preservation agreement) was to force others (Austin, the general contractor, and Slant-Fin, the manufacturer) to change their manner of doing business or to force Hudik to terminate its contract with Austin. The Court affirmed the Board's finding that such an object existed and that the "union's objectives were not confined to the employment relationship with Hudik but included the object of influencing Austin in a manner prohibited by 8(b)(4)(B)" (97 Sup. Ct. at 905). Left open by that decision was the question of whether any alternative mechanism exists for enforcement by a union of a contract with a subcontractor like Hudik.

The answer given by the court of appeals here is in the negative. On the other hand, both the D.C. Circuit and the 4th Circuit have stated contrary views. In Enterprise Ass'n, Local 638 v. N.L.R.B., 521 F.2d 885 (D.C. Cir. 1975), reversed, ___ U.S. ___, 97 Sup. Ct. 891 (1977), while the five-judge majority thought that picketing to enforce the contract was lawful, a conclusion rejected by this Court, the four-judge minority agreed with the majority that peaceful pursuit by the Union of a remedy of recompensing employees for the value of the work lost as a consequence of Hudik's breach of its collective bargaining agreement would have been lawful (id. at 937-40). Clearly, all nine members of the court regarded the

contract as enforceable; their only dispute was as to the means. The Fourth Circuit has also expressed the view that work preservation clauses can be peacefully enforced even in a context in which the contracting employer does not have the right to control assignment of the work. George Koch Sons, Inc. v. N.L.R.B., 490 F.2d 323, 327 (1973). The opinion of the Board here and in Associated General Contractors, supra, also supports that conclusion.

Although this Court has not yet addressed this precise question, it has had occasion to observe that even secondary activity "could have a limited goal and the forseeable result of the conduct could be, while disruptive, so slight that the 'cease doing business' requirement is not met." N.L.R.B. v. Local 825, Int'l Union of Operating Engineers, supra, at 305. The Second Circuit also recognized this same limitation on 8(b)(4)(B) and 8(e) in Danielson v. Int'l Org. of Masters, Mates & Pilots, 521 F.2d 747 (1975). There, a collective bargaining agreement was challenged under Section 8(e). The court first found the agreement not to be one of work preservation under National Woodwork. However, the union also urged that since it did not seek to restrain the sale but only to collect damages, the agreement did not force the seller to cease doing business with any other person. In rejecting this

claim, the court noted that the contract did not provide the seller "with a reasonable alternative (e.g. payment of a fixed sum) that would permit it to sell a vessel without compliance with [the contract]" (Id. at 753).

Here the Union not only did not engage in prohibited secondary activity, but it sought only compensation in the amount of $2,153.60 for the loss of work occasioned by the employer's breach of the collective bargaining contract, a result far removed from that condemned in Enterprise. General on its own volition ceased the work for a short period of time until Carrier agreed to reimburse it for the cost of the grievance settlement.

The effect of the settlement reached here and possible awards to similar effect in the future does in no way preclude purchase of Carrier units with plenums attached or prevent subcontractors under contract with the Union from bidding on such jobs. As so applied, the agreement and its maintenance are addressed only "to the labor relations of the contracting employer vis-a-vis his own employees." National Woodwork, supra, at 645. For contractors such as General, this simply means that they must take into account another element in their costs in bidding on such jobs, a consequence insufficient to

meet the cease doing business requirement as explicated by the Court in N.L.R.B. v. Local 825, Int'l Union of Operating Engineers, supra.

The importance of this federal question is apparent—if the Second Circuit is correct that seeking redress through a contractual grievance procedure constitutes coercion under (ii), the signatory employer may breach its contractual commitments with impunity.

For all of the foregoing reasons, the court erred not only in holding that 8(b)(4)(ii)(B) had been violated, but in finding an 8(e) violation.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APRIL, 1977

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,

Petitioner,

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CARRIER AIR CONDITIONING CO.
and
NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 25—September Term, 1976.

(Argued September 15, 1976 Decided December 2, 1976.)

Docket No. 76-4046

CARRIER AIR CONDITIONING CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,

Intervenor.

Before:

SMITH, OAKES and MESKILL,

Circuit Judges.

Review of an order of the National Labor Relations Board, dismissing unfair labor practice charges against New York sheet metal workers' union by manufacturer-prefabricator of plenums for air conditioning units and reversing findings of administrative law judge that union had violated §§ 8(b)(4)(i)(B), 8(b)(4)(ii)(B), and 8(e) of the National Labor Relations Act, in connection with

application of "no subcontracting" clause in contract with local sheet metal contractors.

Affirmed in part, reversed in part, and remanded.

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MICHAEL S. WINER, Attorney, National Labor Relations Board, Washington, D. C. (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Carl L. Taylor, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, John S. Rother, Attorney, National Labor Relations Board, of counsel), *for Respondent.*

SOL BOGEN, New York, N. Y., *for Intervenor.*

Brief for Air-Conditioning and Refrigeration Institute, Air Moving and Conditioning Association, American Boiler Manufacturers Association, American Consulting Engineers Council, Architectural Woodwork Institute, Associated Builders and Contractors, Inc., National Society of Professional Engineers, and National Woodwork Manufacturers Association, as amici curiae in support of petitioner, filed by George Miron, Washington, D. C. (Wyman, Bautzer, Rothman & Kuchel, Washington, D. C., of counsel).

OAKES, *Circuit Judge:*

A respected commentator on the difficult subject of labor secondary boycotts has written that "[t]he pressures created by momentous problems of productivity and job security under changing technological and market conditions are contained or released by no more sensitive a legal instrument than a legislative determination to protect neutrals from being drawn into the disputes of others."[1] The case before us presents a classic confrontation between productivity and job security interests, with neutrals caught in the middle; the legal instrument, however far from the ideal, is sufficiently sensitive to furnish us guideposts to decision.

The productivity interest is espoused by the petitioner, Carrier Air Conditioning Co. (Carrier), the charging party before the National Labor Relations Board (the Board or NLRB); Carrier here seeks review of an NLRB order dismissing its General Counsel's complaint. The job security interest is espoused by Sheet Metal Workers' International Association, Local 28, AFL-CIO (the Union or Local 28), intervenor herein and the party against whom Carrier's charges were filed. The neutrals in this dispute are New York City area sheet metal and air conditioning contractors, who signed an agreement containing a "no subcontracting clause" that is central to this case. As enforced by the Union, the clause had the effect of preventing virtually all sales of a specific type of Carrier air conditioning unit—the Moduline—in New York City.

In its unfair labor practice charges, Carrier alleged that the no subcontracting clause violated § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), and that Local 28's actions in relation to the Moduline units violated § 8(b) (4), 29 U.S.C. § 158(b) (4). The Board's General

1 Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. Pa. L. Rev. 1000, 1041 (1965).

Counsel issued a complaint to this effect, and an administrative law judge (ALJ) found that the Act had been violated as alleged. The NLRB reversed the ALJ, however, and dismissed the complaint. *Sheet Metal Workers Local 28 (Carrier Air Conditioning Co.)*, 222 N.L.R.B. No. 110 (1976). Carrier's petition for review of the Board's decision was duly filed in this circuit, pursuant to § 10(f) of the Act, 29 U.S.C. § 160(f).

In reviewing the Board's decision, we are mindful of the Supreme Court's injunction in *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 644 (1967), that the determination whether Sections 8(e) and 8(b)(4) have been violated necessarily involves an inquiry into "whether, under all the surrounding circumstances, the Union's objective was preservation of work . . ., or whether the agreements and [related activities] were tactically calculated to satisfy union objectives elsewhere." Thus our attention must be directed to the remoteness of the threat to the Union of job displacement by the product at issue, the history of relations between the Union and Carrier, and the "economic personality" of the industry. *Id.* at 644 n.38. Such an inquiry necessitates examination in depth of the facts, as to which the ALJ's findings regarding the credibility of witnesses will be adopted here, as they were by the NLRB, 222 N.L.R.B. No. 110, slip op. at 2 & n.3. This examination, coupled with the applicable law, leads us to conclude that the Board erred in various respects. We accordingly affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

In an agreement with Local 28 for the time period August 1972-June 1975,[2] the New York City Chapter of the

2 An earlier agreement, covering the period August 1969-June 1972, contained a similar provision. *See also* note 6 *infra*.

Sheet Metal and Air Conditioning Contractors National Association (the Association) consented not to "subcontract out" work relating to, *inter alia,* "plenums," on the express ground that performance of this work by Local 28 members would help "preserv[e] . . . the work opportunities of the . . . sheet metal workers . . . within the collective bargaining unit . . ."[3] A plenum may be briefly described as a four-sided box made of sheet metal that is attached to an air conditioning unit; it helps to regulate the flow of air into a room, as well as to abate noise. If an Association contractor were to violate the agreement by subcontracting out work on plenums to employers other than those within the collective bargaining unit, the agreement provided for censure for the first offense and for the imposition of a

3 The no subcontracting clause provided in part:

> For the preservation of the work opportunities of the journeyman sheet metal workers and apprentice sheet metal workers within the collective bargaining unit, each Employer within the collective bargaining unit shall not subcontract out any item or items of work described hereinbelow, except that each said Employer shall have the right to subcontract for the manufacture, fabrication or installation of such work with any other Employer within the collective bargaining unit:
>
> 1. Radiator enclosures. . . .
> 2. Functional louvers.
> 3. Attenuation boxes. . . .
> 3a. Sound traps.
> 4. Dampers. . . .
> 5. Skylights, Sheet Metal Sleeves, Pressure Reducing Boxes, Volume Control Boxes, Troffers (plenums), High Pressure Fittings and Gutters (excluding ½ Round Gutters).
> 6. Air handling units in excess of 30,000 C.F.M.'s.
> 7. All other work historically, traditionally and customarily performed by journeyman sheet metal workers and apprentice sheet metal workers within the collective bargaining unit in accordance with the collective bargaining agreement.
>
> All the work described in this "no subcontracting clause" shall be performed by journeyman and/or apprentice sheet metal workers in the bargaining unit covered by this Agreement.

fine, "commensurate with the loss . . . sustained by journeyman sheet metal workers by reason of such violation," for subsequent offenses. The amount of the "loss sustained" was to be determined by a Joint Adjustment Board established by the contract, the Board consisting of twelve members designated by the Association and twelve by the Union.

The plenums of concern here are attached to the type of Carrier air conditioner known as the Moduline, which the ALJ found was "a new and different product." Opinion of James V. Constantine, *Administrative Law Judge,* slip op. at 21 [hereinafter cited as ALJ's Opinion]. The Moduline units are installed in ceilings and connected by ducts to a central fan room, where outside air is drawn into the building, conditioned, and forced by fan pressure through the ducts to the Moduline units. Air passes through the plenum portion of the unit and thence, by virtue of the plenum's air pressure being higher than room pressure, through a distribution baffle, past a bellows, and ultimately into a room through a diffuser. The entire Moduline unit, except for the diffuser slots, is concealed in the ceiling.

Carrier began marketing the first model of the Moduline series, Model 37P, in the early 1960s and around 1970 developed a more sophisticated unit known as Model 37A. Presently both types of units are marketed throughout the United States, except in New York City, and are installed with plenums that are prefabricated and attached at Carrier's Tyler, Texas, plant,[4] whose workers are organized by another local of the same international union here involved.

In reaching the conclusion that the Moduline is a "new" product, the ALJ evidently credited testimony by Car-

4 The parties stipulated below that sheet metal workers locals in all areas of the country except New York have allowed, without objection, installation of Modulines with prefabricated plenums.

rier's "engineering section manager" for Modulines to the effect that attaching the plenum to the control unit is a far more complex operation on the Moduline than it is on conventional air conditioning units. *See* ALJ's Opinion at 11, 22. Specifically, the manager testified that the process of calibration, by which the bellows assembly is adjusted to assure proper plenum pressure and air flow, is the "whole heart" of the Moduline and that it requires the use of special calibration machines located only at the Texas plant. He further testified that Carrier's Texas plant is specifically designed to manufacture Modulines with the plenums attached, that the Texas personnel have been specially trained to perform the plenum calibrations, and that "it would be extremely difficult" to fabricate plenums and attach them to Moduline outside the Carrier Moduline plant. This difficulty is the greater on the more sophisticated Model 37A, because its "bellows assembly . . . is a part of the plenum [and] has to be attached to the plenum in order to be adjusted or calibrated."

The evidence credited by the ALJ indicates that Local 28 has consistently opposed installation of Modulines in the New York area. Carrier first sought to install the Model 37P units in 1966 in a hospital project and in Carrier's own offices in Manhattan. At a meeting late in that year, Local 28 officials told Carrier's district manager that the Modulines "could not come into New York" unless the plenums were made in New York in a shop affiliated with Local 28. When some of the 37P units were delivered in early 1967, the union officials stated that they could not be installed. A few days later, the officials and Carrier's district manager reached an agreement under which the Union would allow Modulines to be installed in the hospital project and Carrier's offices in exchange for Carrier's attempting to redesign the 37P so that the plenum could

be made in New York and later joined to the remainder of the unit.

In late 1967 and 1968, the redesigned 37P was given its first test. After union officials objected to installation of 37Ps with prefabricated plenums in a Manhattan police office building, Carrier agreed to have the plenums manufactured by a New York sheet metal company whose employees were represented by Local 28. The plenums so manufactured, however, did not fit properly, leaked air, and were noisy; as a result, Carrier, which had guaranteed to the City the proper functioning of the units, was obliged to spend $10,000 correcting the defects. The ALJ found that the same problem occurred on a few other small projects in the late 1960s as to which, pursuant to Carrier's agreement with Local 28, plenums were made in New York and joined to the Texas-made control unit. The ALJ concluded that New York area sheet metal contractors were "[unable] . . . to fabricate a workable plenum." ALJ's Opinion at 22. Carrier's district manager, in testimony credited by the ALJ, *see id.*, explained the business result of this inability in simple terms: "We just couldn't sell the [redesigned] unit."

In mid-1970, following the unveiling of the new Model 37A Moduline, Carrier spokesmen met with Union officials in an attempt to convince them that the new models should be allowed into New York with their prefabricated plenums. Carrier argued that the Model 37A could not be produced without a plenum installed at the factory. Meetings went on for over two years without any resolution of the dispute until, in October, 1972, following a change in Union leadership, the new president referred the issue to a Union "research and review committee," composed of three Local 28 members who were recognized experts in the sheet metal industry.

In October, 1972, the committee submitted a report unanimously recommending that the Union *accept* Modulines with prefabricated plenums. A principal reason for this recommendation was the committee's belief that use of Modulines in New York would result in *increased* work opportunities for Local 28 members. This was true because the Moduline system requires an extensive network of distribution ducts, which would be installed by sheet metal workers, whereas alternative systems either cool by water circulation, which involves primarily work for plumbers, or utilize rooftop units, which require little duct work. A few months later, a study by the New York sheet metal industry reached similar conclusions.

While Local 28's president endorsed the committee report, on submission to the Union's executive board, the report was rejected. The executive board recommended that the Union continue to oppose installation of Modulines with prefabricated plenums, and this recommendation was adopted by the Local 28 membership in June, 1973. A few months earlier, in a related proceeding, a sheet metal industry representative had asked the Joint Adjustment Board, established by the Union-Association agreement, to modify the agreement to allow at least a "pilot project" using Modulines. This proposal was rejected by both the Joint Adjustment Board and the Union's executive board.

In mid-1973, a construction contract was awarded for the Van Etten Drug Treatment Center in the Bronx, New York. The architects for this projct specified the use of Carrier Modulines or their equivalent, and 92 Model 37A units were duly ordered. In October, 1973, a member of Local 28, a "sketcher" employed by the subcontractor who was to install the units, erased the Modulines from the blueprint drawings he was assigned to prepare. This led to a telephone conversation between Carrier's district manager and Local 28's president; the ALJ credited the

manager's version of this conversation. ALJ's Opinion at 23. In this version, the Union president confirmed that he had "refused to let them sketch the [Van Etten] job" and that he would "not permit this [Moduline] unit to come . . . into New York." Shortly thereafter, Carrier filed the first of the unfair labor practice charges that have culminated in the case before us. Over the next few months, the parties continued discussions and eventually reached an agreement under which Local 28 allowed installation of Modulines on the Van Etten job in exchange for Carrier asking the NLRB not to proceed on its unfair labor practice charge until after the Union election in July, 1974.

During the first half of 1974, Carrier Moduline units were also specified by architects on another job, known as the "Babies Hospital Addition" to Columbia Presbyterian the Association's agreement with Local 28, but nevertheless Hospital, and were duly ordered. The subcontractor who was to install the units, General Sheet Metal, Inc. (General), was a member of the Association and thus bound by agreed to install the Modulines with prefabricated plenums. Following the election of a new Union president in July, the Union reviewed its position, decided to "insist" that the agreement be enforced "as written," and filed charges against General with the Joint Adjustment Board, alleging that General had accepted work in violation of the agreement. The remedy proposed by the Union was the payment by General into the Local 28 Sick Dues Relief Fund of $2,153.60, a sum claimed to represent the actual wage loss to the Union caused by the use of prefabricated plenums. Shortly thereafter, General ceased installation of the Modulines. Before the Joint Adjustment Board could act on the grievance, General, in March, 1975, paid the requested sum into the Union's fund and resumed installation of the Moduline units at the hospital. Carrier, however, reim-

bursed General for the full amount of the settlement payment, pursuant to an agreement between them.

II. Section 8(e)

Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), makes it an unfair labor practice for a union and an employer "to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. . . ." [5] A brief review of the history of the section is helpful in understanding the nature of the issues presented here. When passed in 1959, as part of the Landrum-Griffin amendments to the National Labor Relations Act, § 8(e) was designed to close a loophole in the secondary boycott provisions of the Act. In *Local 1976, United Brotherhood of Carpenters* v. *NLRB (Sand Door)*, 357 U.S. 108 (1958), the Supreme Court had stated that an employer's voluntary execution or observance of a contractual provision not to handle nonunion material (known as a "hot cargo" clause because of its wide use in Teamsters Union contracts) was not a violation of the Act. By passing § 8(e) in response to the *Sand Door* decision, Congress made such contractual provisions themselves unlawful. *National Woodwork Manufacturers Association* v. *NLRB, supra,* 386 U.S. at 634. At the same time,

5 A proviso to § 8(e) excepts from the proscriptions of that subsection agreements relating to the contracting or subcontracting of onsite construction work. But the proviso does not cover work done elsewhere than on a construction jobsite. *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 630 (1975); *National Woodwork Mfrs. Ass'n* v. *NLRB,* 386 U.S. 612, 638-39 (1967). All parties apparently concede that the proviso is not applicable here, because the work in question, fabrication of plenums, would have been done in offsite sheet metal shops.

however, it retained the distinction between contractual provisions and actions with a secondary purpose and those intended by employees "to preserve for themselves work traditionally done by them." *Id.* at 635. *See* Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRB §§ 8(b)(4) and 8(e),* 113 U. Pa. L. Rev. 1000, 1013 (1965); Note, *Work Preservation and the Secondary Boycott—An Examination of the Decisional Law Since National Woodwork,* 21 Syracuse L. Rev. 907, 909-10 (1970). In short, § 8(e) was directed against "agreements which obligated neutral employers not to do business with other employers involved in labor disputes with the union," 386 U.S. at 636, but not against "primary work preservation agreements," *id.* at 639. But the line between the two types of agreements, however clear in the abstract, often becomes indistinct when the statute is applied to concrete facts. *See Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 386-87 (1969) (Harlan, J.) (lines "separating 'primary' from 'secondary' activities" are "arbitrary, tenuous, and shifting"); *National Woodwork Manufacturers Association* v. *NLRB, supra,* 386 U.S. at 645. *See also NLRB* v. *National Maritime Union,* 486 F.2d 907, 911-12 (2d Cir. 1973), *cert. denied,* 416 U.S. 970 (1974).

The Board's brief argues that, in deciding whether the agreement between the Union and the Association had a work preservation objective or instead was "tactically calculated to satisfy union objectives elsewhere," 386 U.S. at 644, we are limited to considering the words of the agreement and the circumstances surrounding the making of the agreement. We find such a limitation untenable. On an issue like this one, words in an agreement will often amount to little more than routine recitations in anticipation of future litigation, such as the reference to work preserva-

tion in the agreement in the instant case, *see* note 3 *supra*.[6] Moreover, Congress, in passing § 8(e), made clear its intention to proscribe, in the wake of *Sand Door*, not merely the signing of a "hot cargo" agreement, but also voluntary employer adherence to such an agreement. *See National Woodwork Manufacturers Association* v. *NLRB*, *supra*, 386 U.S. at 634; Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 Harv. L. Rev. 904, 913-14 & n. 37 (1976). While there may be a few situations in which an approach testing the relevant contractual provision as it has been applied could cause otherwise valid agreements to be invalidated because of one illegal union action, *see Sheet Metal Workers Local 223* v. *NLRB*, 498 F.2d 687, 697 (D.C. Cir. 1974), this case does not present such. We agree with the Ninth Circuit that a facially valid agreement may be invalid for § 8(e) purposes in particular factual contexts. *Associated General Contractors* v. *NLRB*, 514 F.2d 433, 439 (9th Cir. 1975). In its other applications, the same agreement may retain its validity. *See* Leslie, *supra*, 89 Harv. L. Rev. at 914.

Our analysis regarding the congressional purpose underlying § 8(e) also helps to explain why the §8(e) charge is not barred by § 10(b) of the Act, 29 U.S.C. § 160(b), which establishes a six-month limitation period between the occur-

6 The work preservation references at the beginning of the no subcontracting clause and in numbered paragraph 7 thereof are complemented by the last paragraph, which provides that all work for which subcontracting is proscribed shall be performed by Local 28 members. *See* note 3 *supra*. The last paragraph was not contained in the earlier, 1969-1972 agreement; the Union's counsel indicated to the ALJ that the paragraph was added to emphasize the Union's work preservation goals. The emphasis was hardly necessary for purposes of the agreement, however, since the Association members were already bound, by the preceding paragraph of the clause, to do the specified work in their own or other Local 28-organized shops. One can only surmise that the added language was window dressing, intended to impress, perhaps, the potential arbiters of any § 8(e) dispute that might arise—the ALJ, the NLRB, or the members of a reviewing court.

rence of an unfair labor practice and the filing of a charge with the NLRB.[7] The statute proscribes only "enter[ing] into" certain agreements, and, if this language were taken to mean that only the signing were prohibited, the six-month period would have passed here long before Carrier filed an unfair labor practice charge. The "enter into" language of § 8(e) has not been so construed, however. Instead, this court and others, as well as the NLRB, have held that a union may "reaffirm" an agreement, and thus, in effect, "re-enter" into it, by seeking to enforce it, at least when the enforcement effort itself appears to have a secondary objective. *Danielson* v. *International Organization of Masters, Mates & Pilots*, 521 F.2d 747, 754 (2d Cir. 1975); *NLRB* v. *Local 28, Sheet Metal Workers*, 380 F.2d 827, 829-30 (2d Cir. 1967); *Los Angeles Mailers Union No. 9* v. *NLRB*, 311 F.2d 121, 123 (D.C. Cir. 1962) ("To seek to give it life is in substance to seek to have it agreed to, which is no different in substance from seeking to have it entered into"); *Bricklayers & Stone Mason Local 2 (Associated General Contractors)*, 224 N.L.R.B. No. 132, slip op. at 11-13 (1976). *See also NLRB* v. *International Brotherhood of Electrical Workers*, 405 F.2d 159, 164 (9th Cir. 1968) (construing "enter into" language of § 8(b)(4)), *cert. denied*, 395 U.S. 921 (1969); *NLRB* v. *Milk Wagon Drivers Local 753*, 335 F.2d 326, 329 (7th Cir. 1964) (same). Because we conclude, as discussed below, that Local 28's contract enforcement efforts here had a secondary objective, we hold that the § 10(b) limitation period does not bar a finding that § 8(e) has been violated in this case. Moreover, once the possibility of a violation within

7 Section 10(b), 29 U.S.C. § 160(b), provides in pertinent part:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

the six-month period is recognized, "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period . . . ." *Local 1424, International Association of Machinists* v. *NLRB*, 362 U.S. 411, 416 (1960) (Harlan, *J.*).[8]

Turning to the question whether, as applied by the Union in this case, the no subcontracting clause had a valid work preservation purpose or a proscribed secondary purpose, we believe that the facts recited at length above leave no doubt that the object was Carrier and the

8 The Board also argues here that the "enter into" language of § 8(e) requires a showing of a "bilateral agreement," whereas in the instant case the Union acted unilaterally. This argument was not alluded to in the Board's opinion below—indeed, the opinion did not analyze § 8(e), *see* note 9 *infra*—and is thus in the nature of a post hoc rationalization. Moreover, if addressed to the fact that only the Union really cared about enforcing the no subcontracting clause, the argument proves too much, since this must be true of all "hot cargo" agreements.

If addressed to a situation in which an employer signs an agreement and then is reluctant to comply with it, the argument is simply wrong as to both the facts and the law. The signatory Association here joined with the Union in April, 1973, in rejecting, through the Joint Adjustment Board (on which they had equal representation), a proposal to modify the agreement to allow the introduction of Modulines in New York. Moreover, in connection with the Babies Hospital job, General, a member of the Association, acquiesced in the Union's interpretation of the agreement to the extent of paying the full sum requested by the Union in March, 1973; while Carrier reimbursed General, it did so only because General refused to proceed with installation of the Modulines until the grievance was settled. To the extent that an interpretation of an agreement is reflected in actions, therefore, it seems clear that the anti-Moduline interpretation here was a bilateral one. Finally, even if no acquiescence at all by the sheet metal contractors could be found, this fact would not affect the agreement's validity under § 8(e). This court has recently held that a union can unilaterally reaffirm an agreement violative of § 8(e) merely by making a demand for compliance; actual compliance by the signatory employer need not be shown. *Danielson* v. *International Organization of Masters, Mates & Pilots*, 521 F.2d 747, 754 n.8 (2d Cir. 1975).

objective secondary, a conclusion also reached by the ALJ.[9] The Union conceded, before both the ALJ and the Board, that its principal dispute was with Carrier, but, rather than applying leverage directly against Carrier, the Union relied on the no subcontracting clause in its agreement with the Association to keep Modulines out of New York. Such reliance would have been permissible if

9 The Board argues that it did not reach the primary/secondary and work preservation questions in relation to the § 8(e) charge (and the § 8(b)(4) charges) and that, if this court holds the questions must be reached, we should remand to the Board for further findings on these questions. We believe the Board did reach the questions, albeit implicitly, and that in any event such a remand would serve no purpose. The Board was quite cryptic—not to say Delphic—in its fiat that § 8(e) had not been violated by the no subcontracting clause either as written or as applied, *see* 222 N.L.R.B. No. 190, slip op. at 12 & n.10; *cf. Oil, Chemical & Atomic Workers Local 4-243* v. *NLRB*, 362 F.2d 943, 946 (D.C. Cir. 1966) (Board has obligation to state reasons for its disagreement with ALJ), but, given the *National Woodwork* test quoted *supra*, which the Board's brief recognizes as governing, a determination as to the primary/secondary or work preservation nature of an agreement is implicit in every § 8(e) decision. Even if the Board had not reached the issue, moreover, additional findings would be of little assistance in resolving it. The ALJ's findings of fact, which were essentially accepted by the Board, show a pattern of secondary activity and a purpose other than work preservation, which he found more than sufficient for § 8(e) purposes, a conclusion with which we agree. While the Board's expertise on matters within its special competence is of course entitled to deference from this court, *see, e.g., NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975), the Board's findings are of less value when we have before us the findings of the Board's own hearing officer, *see Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951), and when the questions of law are so interrelated with the facts of the case and require for their resolution common sense as much as legal erudition, *see NLRB* v. *Universal Camera Corp.*, 190 F.2d 429, 430 (2d Cir. 1951) (on remand) (L. Hand, *J.*). *See also NLRB* v. *Local 825, International Union of Operating Engineers*, 400 U.S. 297, 303 (1971) ("here the normally difficult task of classifying union conduct [as primary or secondary] is easy"). As did the Ninth Circuit, we agree with the ALJ on matters that the Board purportedly did not reach. *Associated General Contractors* v. *NLRB*, 514 F.2d 433, 438-39 & n.7 (9th Cir. 1975).

the Union's purpose was work preservation, but this was not the case. It may be true, as the Board found, that "Local 28 members have traditionally fabricated and installed the plenums on *conventional* air-conditioning units." [10] 222 N.L.R.B. No. 110, slip op. at 5 (emphasis added). As the ALJ found, however, the Moduline is not a "conventional" unit, but rather is "a new and different product," and fabrication of the Moduline plenums "is not work traditionally and historically performed" by members of Local 28. ALJ's Opinion at 21. *Compare National Woodwork Manufacturers Association* v. *NLRB, supra,* 386 U.S. at 646. Support for this view can be found in the fact that, when the Moduline was redesigned to allow separate fabrication of plenums in New York,[11] the precision calibration required simply could not be accomplished satisfactorily.

It is thus appropriate that, in assessing the legal significance of the agreement's prohibition on subcontracting work related to "plenums," a distinction be made between the plenums on conventional air conditioning units and those on Moduline units. While, with regard to other

10 Even this statement is open to doubt, at least if it is taken to suggest that Local 28 members fabricated plenums on *all* other units in New York. Carrier's district manager testified—and the Union did not challenge his testimony on this point—that "literally hundreds of thousands" of Carrier units other than Modulines have been installed in New York, in buildings as large as the World Trade Center, with plenums prefabricated at Carrier's Texas plant. Local 28 members installed these units without objection.

11 The few isolated instances in which Local 28 members fabricated Moduline plenums are not, of course, any evidence of such work being "traditionally" performed by Local 28, as the ALJ recognized, ALJ's Opinion at 23. Rather, those instances occurred only because Carrier was seeking to settle the dispute with Local 28 that is the subject of the instant case.

plenums, the no subcontracting clause may have served a valid work preservation purpose, as applied to *Moduline* plenums—part of a new type of air conditioner—the no subcontracting clause served only to aid Local 28 in "'trying to acquire work performed by employees' of Carrier in Tyler, Texas." ALJ's Opinion at 21, *quoting Associated General Contractors* v. *NLRB, supra,* 514 F.2d at 438. In Justice Harlan's words, this is "a case of a union seeking to restrict by contract . . . an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs." *National Woodwork Manufacturers Association* v. *NLRB, supra,* 386 U.S. at 648 (concurring memorandum).[12]

III. Section 8(b)(4)

While often described as a "secondary boycott" section of the Act, *see, e.g., NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 686 (1951), § 8(b)(4) in fact proscribes, not all secondary boycotts, but rather "specific union conduct directed to specific objectives," *Local 1976, United Brotherhood of Carpen-*

12 Because we find ample direct evidence of the no subcontracting clause's secondary purpose, unrelated to work preservation, we need not consider whether such a purpose may be inferred on the basis that the Association members here lacked the "right to control" the work sought by the Union. The Board's "right to control" test has been highly controversial, *compare* majority, concurring, and dissenting opinions in *Enterprise Association of Steamfitters Local 638* v. *NLRB,* 521 F.2d 885 (D.C. Cir. 1975) (en banc, 5-4), *cert. granted,* 424 U.S. 908 (1976), has been rejected explicitly by five circuits and perhaps implicitly by our own, *see* citations in *id.* at 888-89 & n.3, and was the subject of recent argument before the Supreme Court, *see* 45 U.S.L.W. 3276 (U.S. Oct. 6, 1976) (argument in No. 75-777, *NLRB* v. *Enterprise Association of Steamfitters Local 638, supra*). In the *Enterprise Association* case, moreover, unlike the instant one, the Board and the court of appeals agreed that the purpose of the union's activities was the preservation of work traditionally performed by its members. 521 F.2d at 888, 900.

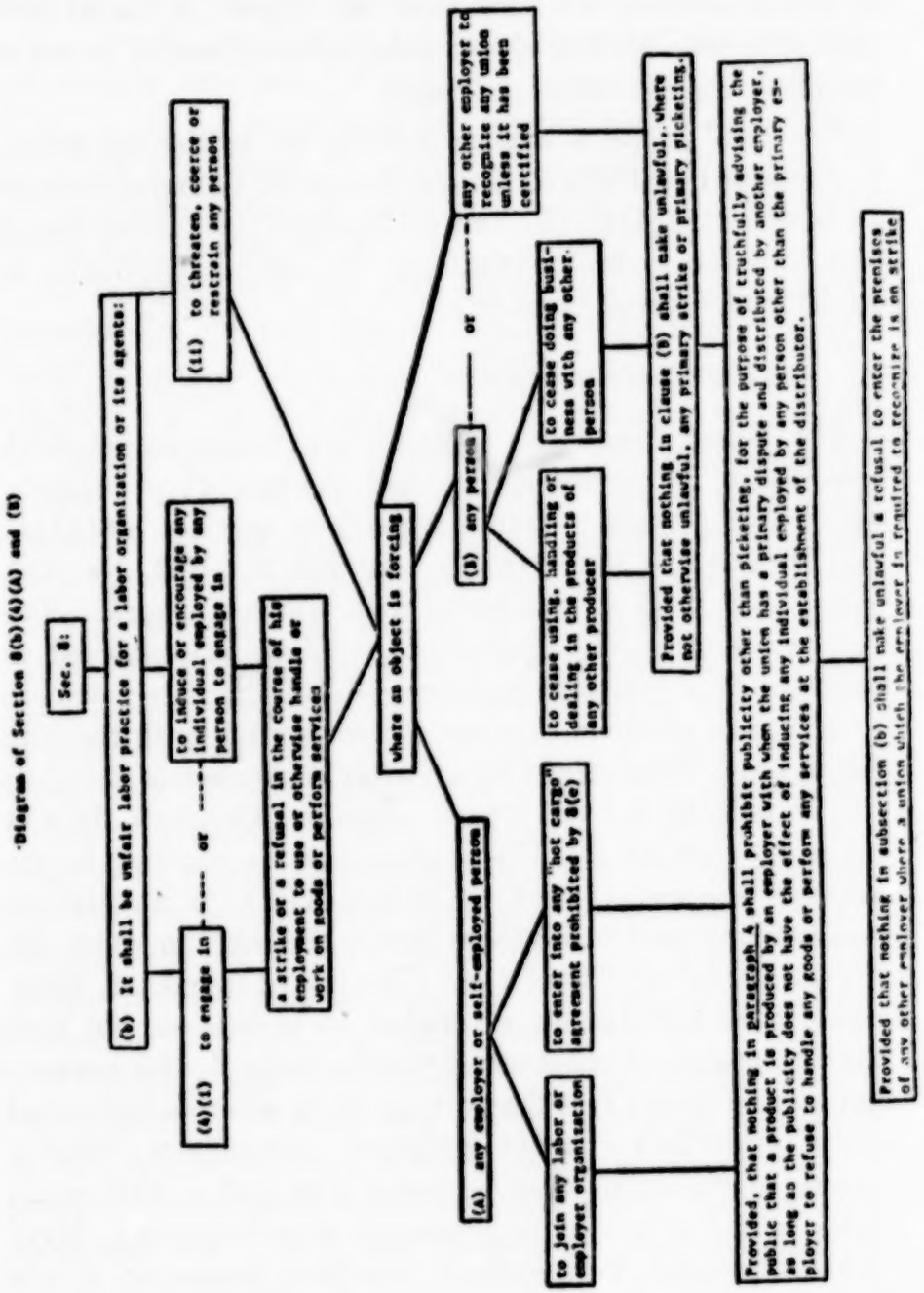
ters v. *NLRB*, 357 U.S. 93, 98 (1958). It does so, moreover, in relatively precise terms, *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra,* 394 U.S. at 388, and the words of the statute must thus be the courts' principal referent in determining whether the section has been violated, *Local 1976, United Brotherhood of Carpenters* v. *NLRB, supra,* 357 U.S. at 100. While specific, however, the section, with its clauses, subclauses, and provisos, is quite difficult to follow; instead of setting out the exact statutory language in the margin, we have reproduced there a useful "roadmap" to § 8(b)(4).[13]

Before a violation of § 8(b)(4)(B) can be found, two separate determinations must be made. One relates to the *nature* of the union's conduct: whether the union or its agents engaged in, induced or encouraged a refusal to perform services (§ 8(b)(4)(i)) or threatened, coerced or restrained any person (§ 8(b)(4)(ii)). The second relates to the *purpose* of the Union's conduct: whether an object was to force any person to cease handling the products of, or doing business with, another. We discuss the first of these issues in detail below, considering separately the alleged violations of clauses (i) and (ii). With regard to the purpose issue, however, our conclusion in the § 8(e) discussion as to the secondary focus of Local 28's activities is equally applicable here. The type of contract prohibited by § 8(e) is one in which the employer agrees to do that which § 8(b)(4)(B) prohibits the union from attempting to force the employer to do; the language of the former subsection "closely tracks" that of the latter. *National Woodwork Manufacturers Association* v. *NLRB, supra,*

13 The following diagram of § 8(b)(4) was developed by Professor David Feller for uses in his labor law courses at the University of California at Berkeley:

(*footnote continued on next page*)

13 (*continued from previous page*)



386 U.S. at 635; *see id.* at 649 (Harlan, *J.*, concurring), 660 (Stewart, *J.*, dissenting). On the basis of facts detailed at length above and our analysis of them in the § 8(e) discussion, we hold that "an object" of Local 28's activities was forcing sheet metal subcontractors to cease handling Carrier Moduline units.

The ALJ made a similar holding as to the secondary purpose of Local 28's conduct and went on to find violations of both § 8(b)(4)(i)(B) and § 8(b)(4)(ii)(B). The Board disagreed as to both violations. We affirm the Board as to (i) and reverse as to (ii).

A. *Section 8(b)(4)(i)(B)*

The Board found the evidence insufficient to establish that Local 28 or its agents had "induce[d] or encourage[d]" employees to refuse to perform services, § 8(b)(4)(i), 29 U.S.C. § 158(b)(4)(i); *see* 222 N.L.R.B. No. 110, slip op. at 12-13, a conclusion with which we agree. The record contains one statement that might be construed as evidence of an attempt by Local 28 to induce its members to refuse to perform services. In connection with the Van Etten Drug Treatment Center, after a member of Local 28 had erased Modulines from blueprints, Carrier's district manager said to the Union president (according to the manager's account, credited by the ALJ), "I understand you have refused to let them sketch the job," to which the president replied, "That's so." The Board found this statement to be ambiguous; we find it to be less so, but note that its weight is substantially undermined by its hearsay nature and by the fact that it represents what an interested party (Carrier's district manager) remembers about a phone conversation that occurred one and a half years prior to the time that he recounted it in testimony. Even if the statement were entirely accepted, moreover, it is a

tractors v. *NLRB, supra,* 514 F.2d at 438 ("when Congress used 'coerce' in Section 8(b)(4)(B) it . . . intended to reach any form of economic pressure of a compelling or restraining nature"); *Local 48, Sheet Metal Workers* v. *Hardy Corp., supra,* 332 F.2d at 686 (term "coerce" was meant to encompass "non-judicial acts of a compelling or restraining nature, . . . consisting of a strike, picketing or other economic retaliation or pressure"); *NLRB* v. *Local 825, International Union of Operating Engineers,* 315 F.2d 695, 697 & n.3 (3d Cir. 1963).

In its brief here, the Board adopts a position that its opinion did not take below. Conceding that the use of a wide range of economic sanctions is proscribed by § 8(b)(4)(ii)—a concession that is virtually unavoidable in light of the authorities discussed in the preceding paragraph—the Board argues that this case involves "not economic retaliation but an agreed upon arbitral procedure for compensation for a breach of contract." It then goes on to argue that, because of the similarities between court proceedings and arbitration, resort to the latter should be treated like resort to the former for purposes of § 8(b)(4)(ii). We need not decide whether resort to bona fide arbitration procedures would constitute unlawful coercion, although it should be noted that the Board's premise of relevant similarities between judicial and arbitral forums is open to serious question, *see Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 57-58 (1974) (Title VII); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581-82 (1960).

We find instead that the contract here did not involve the equivalent of bona fide arbitration. The contractual procedures under which General paid a fine—and pursuant to which other subcontractors were doubtless deterred from accepting work involving Modulines, thus enabling the Union to effectuate its repeated threat to Carrier to keep

a refusal to perform services—simply is not the type of inducement or encouragement that § 8(b)(4)(i)(B) makes illegal. *See NLRB* v. *Local 751, United Brotherhood of Carpenters,* 285 F.2d 633, 640 (9th Cir. 1960) (resolution withholding any recommendation or direction as to a course of action).

B. *Section 8(b)(4)(ii)(B)*

Because we have already held that the Union's conduct had a secondary purpose, the only issue remaining is whether that conduct amounted to the threats, coercion, or restraint prohibited by clause (ii). The Board reasoned that the Union's repeated statements about not allowing Modulines with prefabricated plenums into New York and the Union's invocation of the contractual grievance procedure against General were "merely" attempts to enforce the no subcontracting clause "'through peaceful means provided by the agreement and by no other means.'" 222 N.L.R.B. No. 110, slip op. at 12, *quoting Southern California Pipe Trades District Council No. 16 (Associated General Contractors),* 207 N.L.R.B. 698, 699 (1973), *reversed sub nom. Associated General Contractors* v. *NLRB,* 514 F.2d 433 (9th Cir. 1975). The Board's approach of equating all peaceful, contractually allowed means with noncoercive or nonthreatening means was rejected by the Ninth Circuit in *Associated General Contractors,* 514 F.2d at 438-39, as the Board recognized but was unconcerned with here, 222 N.L.R.B. No. 110, slip op. at 12 n.9. We agree with the Ninth Circuit and accordingly reverse the Board.

The Board's approach fails to distinguish among various ways in which an agreement may be enforced. Resort to the courts for enforcement of a contract provision, while undoubtedly a somewhat coercive act, *see Local 48, Sheet Metal Workers* v. *Hardy Corp.,* 332 F.2d 682, 686 (5th Cir. 1964), does not, to be sure, constitute the sort of coercion that Congress intended to make unlawful. *See, e.g., Acco Construction Equipment, Inc.* v. *NLRB,* 511 F.2d 848, 852 (9th Cir. 1975) (dictum); *Local 48, Sheet Metal Workers* v. *Hardy Corp., supra,* 332 F.2d at 686-87 (extensive citation of legislative history); *Orange Belt District Council of Painters No. 48* v. *NLRB,* 328 F.2d 534, 537 (D.C. Cir. 1964) (dictum).[15] When a contract specifies enforcement procedures that are not judicial in nature, however, nothing in the Act, the legislative history, or judicial decisions precludes a court from characterizing as threats or coercion what any layman would call by those names. Indeed, the legislative history and the decisions on point indicate that Local 28's actions here must be considered conduct violative of § 8(b)(4)(ii).

The Board's apparent position—that contractually based "peaceful means" of seeking a secondary end are legal—is contradicted by the legislative history, which evinces Congress's intention to outlaw a fairly broad range of economic pressure tactics. In introducing the bill that eventually became known as the Landrum-Griffin Act, Representative Griffin told the House:

> The courts . . . have held that . . . [a union] may threaten the secondary employer, himself, with a strike *or other economic retaliation* in order to force him

15 Even when the contract provision in question is invalid under § 8(e), as is the one here, resort to the courts should not be considered § 8(b)(4)(ii) coercion. To hold otherwise would be to give the word "coerce" in effect two meanings, since identical acts would be legal in some circumstances and illegal in others, with the determination of legality made after the fact in relation to another statute. *See* Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust,* 89 Harv. L. Rev. 904, 913 (1976). Of course, resort to the courts to enforce a provision invalid under § 8(e) will almost always be futile, given the section's declaration that such provisions are "unenforcible [sic] and void."

> to cease doing business with a primary employer with whom the union has a dispute. This bill makes such coercion unlawful by the insertion of a clause 4(ii). . . .

105 Cong. Rec. H13,092 (daily ed. July 27, 1959), *reprinted in* 2 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1523 (emphasis added). Similarly, Senator Goldwater, in an "analysis" submitted to the Senate on the day the President signed the Landrum-Griffin Act, said:

> Thus, although employers and unions . . . may lawfully enter into such agreements, and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint—*economic or otherwise*—may be used by any party to such agreement, even if entered into voluntarily by both parties, to compel the other party to live up to the contract or to refrain from breaching it.

105 Cong. Rec. A8524 (daily ed. Oct. 2, 1959), *reprinted in* 2 NLRB, supra, at 1858 (emphasis added). Numerous court decisions since passage of the Act have reached similar conclusions after examining the legislative history. *See, e.g., NLRB* v. *Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 68 (1964) ("the prohibition of § 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise"); *NLRB* v. *Local 445*, 473 F.2d 249, 253 (2d Cir. 1973) (provision allowing union to enforce lawful hot cargo agreement "by the use of economic force" held invalid under § 8(e), because "Congress intended that enforcement of such provisions may be effected only through the courts"); *Local 644, United Brotherhood of Carpenters* v. *NLRB*, 533 F.2d 1136, 1145 (D.C. Cir. 1975), *quoting Orange Belt District Council of Painters No. 48* v. *NLRB, supra*, 328 F.2d at 537; *Associated General Con-*

poor substitute for direct evidence that Union officials actually told the sketcher that he should erase the Modulines. The record does not indicate that either the Union president or the sketcher was asked about what steps, if any, the president took to effectuate his alleged refusal "to let them sketch the job."

Other than the sketching incident on the Van Etten job, there is no evidence that Local 28 members ever refused to perform services for reasons related to the use of Carrier Modulines.[14] While such evidence is not required to establish a violation of §8(b)(4)(i)(B), since it is the inducement or encouragement itself that is proscribed, *NLRB* v. *Associated Musicians Local 802*, 226 F.2d 900, 904-05 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956), evidence of this sort would certainly have made it easier to infer that a violation had occurred.

Of greater importance is the fact that, other than the Union president's refusal "to let them sketch the job," there is no evidence that Local 28 officials did in any way encourage employees to refuse to perform services. The ALJ cited, as evidence of such encouragement, the resolution, passed by the Union's executive board and adopted by the membership, that refused to modify the agreement to allow installation of Modulines. ALJ's Opinion at 23. We share the NLRB's view that this resolution "merely asked the union members to decide whether their contractual rights should be waived" and that it did not suggest "that the contract would be enforced by proscribed economic action." 222 N.L.R.B. No. 110, slip op. at 10-11. A resolution of this sort—containing a statement of policy but not recommending, explicitly or implicitly, that the policy be enforced by

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14 When Moduline installation work stopped on the Babies Hospital Addition, it was the result of a decision, not by Local 28 members, but by the president of General, the sheet metal subcontractor, acting in response to the grievance filed by the Union. *See* ALJ's Opinion at 18-19.

Modulines out of New York—were to be implemented by the "Joint Adjustment Board" of 24 members, half from the Union, half from the subcontractors' association. The factors that give true arbitration some resemblance to a court proceeding, particularly the presence of a neutral factfinder with no stake in the outcome of the dispute, were conspicuously absent here. The Supreme Court has recently emphasized the courts' obligation to scrutinize with care even arbitration proceedings that superficially appear regular in all respects. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976). It follows, a fortiori, that when a contractual grievance procedure does not resemble arbitration, we should not so characterize it.

The fines authorized by the agreement here plainly were applied, or were threatened to be applied, in a way that gave the Union economic leverage over the subcontractors. And, as in *Associated General Contractors, supra,* that leverage "had the desired effect of pressuring [subcontractors] to pressure others to change their business practices." 514 F.2d at 439. It makes no difference that the subcontractors as a group would have formally joined with the Union, through the Joint Adjustment Board, in imposing the fines; as applied to the individual subcontractor, the fines were unquestionably coercive, as is demonstrated by the case of General, which stopped work on the Babies Hospital Addition as soon as a fine was threatened. *See id.* at 436, 439 (fines imposed by a similar joint board); *cf.* Leslie, *supra,* 89 Harv. L. Rev. at 912 & n.28 (suggesting interest of subcontractors as a group in policing compliance of individual subcontractors). Moreover, while the interpretation of the agreement to exclude Modulines was a joint one on the part of the Union and the Association, *see* note 8 *supra,* the initiative for all of the anti-Moduline efforts came from the Union acting uni-

laterally, making the Union's role in the economic coercion as clear as it could ever be. *See Acco Construction Equipment, Inc.* v. *NLRB, supra,* 511 F.2d at 852 ("unilateral fining" by union constitutes "coercive economic pressure"); *NLRB* v. *International Brotherhood of Electrical Workers, supra,* 405 F.2d at 163 ("unilateral rescission" by union is "a form of prohibited economic coercion"). We accordingly find that the Board erred in its holding that Local 28 had not violated § 8(b)(4)(ii)(B).

Order affirmed in part and reversed in part. Case remanded to NLRB for proceedings not inconsistent with this opinion.

SMITH, *Circuit Judge* (dissenting):

I respectfully dissent. While I agree that we should reject the six-month limitation claim, *Danielson* v. *International Organization of Masters, Mates & Pilots,* 521 F.2d 747, 754 (2d Cir. 1975), *NLRB* v. *Local 28, Sheet Metal Workers,* 380 F.2d 827 (2d Cir. 1967), and that we should reject the Board's reversal of the Administrative Law Judge as to coercion, I would remand for further findings. It can be argued with some basis in the record that the contract provisions barring prefab units in air conditioning equipment unless assembled in Local 28 shops is a work preservation device under *National Woodwork Manufacturers Ass'n* v. *NLRB,* 386 U.S. 612 (1967). Local 28 is not really trying to improve the lot of Carrier's employees in Tyler, Texas but to maintain employment in New York for Local 28 people in putting together the plenums. See *NLRB* v. *Local 28, supra.*

The Board might well find that the plenum was not a new product but one within the competence and experience

of the New York subcontractors and the members of Local 28.[1]

The Board could therefore have found that the union's objective was preservation of work. Since the Board found the union's actions not coercive, it did not reach this issue.

I agree with the majority that the Board's finding of lack of coercion (which the Board based on the Board's puzzling "peaceful means" test) cannot be sustained. The work preservation issue, however, remains and we should have the benefit of the Board's consideration of this issue before finally disposing of the matter.

I would reverse the Board on the coercive nature of the union's actions, and remand for findings on the work preservation issue.

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1 See the testimony as to the Staten Island Community College job in 1970 set forth in the Administrative Law Judge's opinion (Appendix at 17-18).

APPENDIX B

MFP

222 NLRB No. 110

D--864
Bronx, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION,
LOCAL 28, AFL--CIO

and

Case 2--CC--1296

CARRIER AIR CONDITIONING
COMPANY, A DIVISION OF
CARRIER CORPORATION

SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION,
LOCAL 28, AFL--CIO

and

Case 2--CE--66

CARRIER AIR CONDITIONING
COMPANY, A DIVISION OF
CARRIER CORPORATION

and

THREE BORO SHEET METAL AND
VENTILATING CO., INC.

Party to the Contract

DECISION AND ORDER

On July 17, 1975, Administrative Law Judge James V. Constantine issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief, the Charging

Party filed limited exceptions, and the Charging Party and the General Counsel filed briefs in support of the Administrative Law Judge's Decision.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Administrative Law Judge's Decision, the exceptions, and briefs, and the entire record in the case,[2] and hereby adopts the findings,[3] conclusions, and recommendations of the Administrative Law Judge only to the extent consistent herewith.

The amended complaint alleges that Respondent violated Section 8(b)(4)(i) and (ii)(B) by adopting a resolution in or about May 1973 that its members would oppose the installation of Carrier's moduline air-conditioning units unless they fabricated the plenums for said units, and by the October 1973 refusal of one of its members employed by Three Boro to perform certain sketching work preparatory to and necessary for the installation of Carrier moduline units. The complaint further alleges that Respondent violated Section 8(b)(4)(i) and

1/ The Intervenor, Sheet Metal and Air Conditioning Contractors National Association (hereinafter SMACNA) did not file a brief.

2/ The Respondent has requested oral argument. The request is hereby denied inasmuch as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

3/ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

(ii)(B) by informing Carrier representatives on or about October 23 and November 26, 1973, that its members employed by Three Boro would not be permitted to make sketches for the Carrier moduline units and on those same dates and again on July 23, 1974, that Respondent was not going to permit Carrier units to be installed in New York because employees represented by it were not fabricating the plenums. Finally, the complaint alleges that by the above acts, the Respondent applied the no-subcontracting clauses in its contracts with SMACNA and Three Boro in violation of Section 8(e). At the hearing, the complaint was amended further to allege that in November 1974, Respondent, by bringing industry charges against General Sheet Metal, Inc., violated Section 8(b)(4)(B) and (e) of the Act. The Administrative Law Judge found the violations as alleged. We disagree. We believe that a contrary result is dictated by our decisions in Associated General Contractors[4] and Kimstock Division.[5]

The collective-bargaining agreement between Respondent and Sheet Metal and Air Conditioning Contractors National Association, New York Chapter, Inc., to which Three Boro Sheet Metal and Ventilating Co., Inc., is bound by a separate agreement, contains a no-subcontracting clause which provides in pertinent part:

4/ Southern California Pipe Trades District Council No. 16 of the United Association, et al. (Associated General Contractors of California, Inc.), 207 NLRB 698 (1973).

5/ Southern California Pipe Trades District Council No. 16; Plumbers & Steamfitters Local No. 582 (Kimstock Division, Tridair Industries, Inc.), 207 NLRB 711 (1973).

II. MEMORANDUM CONTAINING
NO SUBCONTRACTING CLAUSE

For the preservation of the work opportunities of the journeyman sheet metal workers and apprentice sheet metal workers within the collective bargaining unit, each Employer within the collective bargaining unit shall not subcontract out any item or items of work described hereinbelow; except that each said Employer shall have the right to subcontract for the manufacture, fabrication or installation of such work with any other Employer within the collective bargaining unit:

1. Radiator enclosures except when manufactured and sold as a unit including heating element.

2. Functional louvers.

3. Attenuation boxes except for mechanical devices contained therewith.

3a. Sound traps.

4. Dampers: All types of Dampers, including Automatic Dampers and multi-Zone Dampers, Manual Control Dampers and Fire Control Dampers, except Patented Pressure Reducing Devices. OBD's and Santrols are per sketches B and C annexed hereto.

5. Skylights, Sheet Metal Sleeves, Pressure Reducing Boxes, Volume Control Boxes, Troffers (plenums), High Pressure Fittings and Gutters (excluding 1/2 Round Gutters).

6. Air handling units in excess of 30,000 C.F.M.'s.

7. All other work historically, traditionally and customarily performed by journeyman sheet metal workers and apprentice sheet metal workers within the collective bargaining unit in accordance with the collective bargaining agreement.

All the work described in this "no-subcontracting clause" shall be performed by journeyman and/or apprentice sheet metal workers in the bargaining unit covered by this agreement.

No penalty is specified in the no-subcontracting clause. However, Rule XIX of the agreement provides that the penalty for violation of the agreement shall

be censure for the first offense; and on the second offense, imposition of a fine commensurate with the loss adjudged by the Joint Adjustment Board to have been sustained by journeyman sheet metal workers by reason of such violation.

Background

Carrier manufactures moduline air-conditioning units. It began the manufacture of a variable volume moduline air-conditioning unit, designated the model 37P unit, in the early 1960's. Later improvements led to the development of the 37A unit which has been manufactured since 1970. Both of these units included prefabricated plenums. Although numerous parts of each are patented, the plenum is not. The plenum is essentially a four-sided sheet metal box which, inter alia, serves for the housing or receipt of air and noise abatement. In the New York metropolitan area, Local 28 members have traditionally fabricated and installed the plenums on conventional air-conditioning units. Carrier's position is that, due to the design of the moduline units, specially trained personnel working under the supervision of Carrier engineers and utilizing costly equipment are required to perform the work of mating the plenum to the control portions of the unit and the calibration and adjustments necessary to assure proper plenum pressure and air flow.

Carrier first attempted to market its moduline unit in the New York metropolitan area in 1966. Carrier had contracts for the installation of 37P units at its home office and at Presbyterian Hospital. At a meeting in November 1966, Respondent's president told Carrier's district manager, Contardi, that the plenum section of the unit should be made in a New York shop having an agreement with Local 28. In January 1967, the 37P units with prefabricated

plenums were delivered to Carrier's home office for installation. The president and a business agent of Respondent told Contardi that these units could not be installed; the plenums would have to be made in New York. The matter was brought before the Joint Trade Board by Respondent. Subsequently, on or about January 29, 1967, it was agreed that the installation of the 37P units would proceed at Carrier's home office and at the Presbyterian Hospital in consideration for which Carrier would redesign the unit so that the plenum could be made in New York.

In September 1967, Carrier became involved in the construction of a new Police Office Building for the City of New York. The building specifications called for the use of Carrier's 37P units. As a result of the objections of Respondent's president to the use of the 37P units, a series of meetings occurred in September and October 1967 between union officials, Carrier's representatives, and representatives of the City. On October 31, 1967, the parties agreed that Carrier would develop a design which would make possible the fabrication of the plenum in New York shops and that Carrier would assume responsibility for the air-conditioning units on the project even though the plenums were to be fabricated in a local shop. Thereafter, the plenums used in the 37P units installed in the Police Office Building were manufactured by Triangle, a shop employing employees represented by Respondent. After installation of these units, it developed that there were serious problems with leakage in the units for which Carrier was held liable. Carrier contends that the fabrication of the plenums in New York shops made the moduline units defective and uncompetitive in price, and consequently difficult to market.

Carrier developed the 37A unit in 1970. On or about August 8, 1970, Carrier representatives met with Respondent's president and other union agents. Carrier representatives showed the union agents the new 37A unit, stating that it was well received throughout the country, that it was a new design, and in their opinion, the plenums for it could not be made in New York. Respondent's response was that a study of the problem would be made. A number of subsequent meetings failed to produce a resolution of the dispute.

In August 1972, Contardi and other Carrier representatives met with Respondent's president, then Daniel Pasquinucci. As a result of this meeting, Pasquinucci referred the matter to the research and review committee, a committee of three union members known for their expertise and experience in the industry. After studying the problem, this committee recommended acceptance of the moduline unit, factory fabricated, leak tested and calibrated.

Facts Surrounding the Alleged Violations

On June 5, 1973, Local 28's executive board adopted a resolution that "no allowance be made in the c.b.a [collective-bargaining agreement] at all to allow the dual Moduline Mixing Box in the New York city area." This resolution was presented to and adopted by the general membership on June 21, 1973.

In early 1973, plans were prepared for the construction of the Van Etten Drug Treatment Center. The mechanical specifications for heating, ventilation, and air-conditioning called for the use of "variable volume linear air diffusers, Carrier Moduline or approved equal." The heating, ventilation, and air-conditioning contractor on the project, Acme Climate Control Corp., issued a purchase order for the Carrier 37A units pursuant to the specifications. Subsequently, Acme

subcontracted certain sheet metal work, including the installation of the Carrier 37A units on the project, to Three Boro, who was by a separate agreement bound to the terms of the collective-bargaining contract between Respondent and SMACNA. On October 8, 1973, the verbal agreement between Acme and Three Boro was confirmed in a letter in which Three Boro stated:

> We agree to install only (furnished by others) air outlets, fans, air conditioning equipment (50% labor) automatic dampers, sound traps.
>
> We take exception to the following: removals of ductwork, cutting, patching, painting, housekeeping, pipe sleeves, testing and balancing, fin-tube enclosures, plenums for Carrier units (supply outlets) . . . .

On October 18, 1973, the erasure of the Carrier Moduline units from the drawings of the Van Etten job was discovered. Joseph Reyes, the president of Acme Climate Control Corporation, testified that Ted Johannsmeyer, a sketcher employed by Three Boro and a member of Respondent, told Reyes that he had erased the Carrier units from the drawings. Upon being informed of the problems on the Van Etten job, Contardi called Pasquinucci. Contardi's account of the telephone conversation, which the Administrative Law Judge credited was:

> Contardi: Dan I hear there's trouble on the Van Etten job. Dan, I understand you have refused to let them sketch the job.
>
> Pasquinucci: That's so.
>
> Contardi: Dan, are you, as a union representative, telling me, as representative of Carrier, that you will not permit this unit to come in, into New York?
>
> Pasquinucci: That's so.
>
> Contardi: Well, you know what this is going to mean.
>
> Pasquinucci: That's so.

Carrier filed the charge in Case 2--CC--1296 on October 25, 1973, based on the events concerning the Van Etten job. However, the parties continued

to attempt to resolve the dispute without litigation. On November 13, 1973, Contardi and other Carrier spokesmen met with Respondent's officials. At this meeting Pasquinucci told the Carrier representatives that "he could not permit the unit to come in [to New York]." On December 27, 1973, Carrier filed the charge in Case 2--CE--66.

In January 1974, Columbia Presbyterian Hospital entered an agreement with H. Cohan Contracting Corporation to perform all the mechanical work on its Babies Hospital Addition, in accordance with the building specifications prepared by architects and consulting engineers. The specifications called for the installation of Carrier's 37AF air terminal units, including plenums as fabricated by Carrier. Cohan confirmed the purchase order with Carrier for the 37AF units with plenums installed on May 29, 1974. On or about June 11, 1974, Cohan subcontracted certain sheet metal work on the project, including installation of the Carrier moduline units as specified, to General Sheet Metal, Inc. General is a member of SMACNA and is bound by the standard form agreement between that association and Respondent.

Meanwhile, in March 1974, Pasquinucci and Contardi tentatively agreed that Respondent would accept Carrier's moduline units as factory fabricated in consideration for which Carrier would withdraw the instant unfair labor practice charges and promote the moduline units so as to provide additional sheet metal work. This agreement was not executed due to the upcoming union election which Pasquinucci lost to Robert Stack. On July 19, 1974, Contardi met with the newly elected president, Stack, to discuss the agreement made with Pasquinucci. After reviewing the situation, Stack told Contardi that Respondent had decided to "insist that [Carrier] go along with the agreement as written."

Respondent filed charges against General under the SMACNA agreement on November 7, 1974, and requested a hearing and determination by the Joint Adjustment Board.[6/] The grievance charged that:

> General is in violation of our Collective Bargaining Agreement, Addendum "B", Part II, last unnumbered paragraph, by permitting and for accepting work covered by our Agreement---fabrication of plenums---involving the Carrier Moduline Unit, for installation at the Presbyterian Medical Center, Babies Hospital, (168th Street and Broadway New York City) to be performed by persons who are not within the bargaining unit covered by our Agreement, rather than by its journeyman and apprentice sheet metal workers.

Respondent proposed that General pay the sum of $2153.60 to the Local 28 Sick Dues Relief Fund, representing the loss of man hours caused by General's alleged violation. As a result of this claim, General ceased the installation of the Carrier units at the Babies Hospital site. The work was not resumed until Carrier agreed to reimburse General for the amount claimed by Respondent.

Discussion

As noted, the Administrative Law Judge found that the presentation to and adoption by the general membership on June 21, 1973, of the executive board resolution that no allowances be made in the collective-bargaining agreement for the moduline units, constituted a violation of Section 8(b)(4)(i)(B). We disagree. Respondent's executive board simply phrased the proposition to be decided, made a recommendation, and submitted that recommendation for acceptance or rejection. The resolution merely asked the union members to decide whether their contractual rights should be waived. The Board has held that a union agent's inquiry

6/ The Joint Adjustment Board, a body consisting of an equal number of representatives of the Union and of the Employer Association, is established by the collective-bargaining agreement for the purpose of resolving grievances arising out of the interpretation or enforcement of the contract.

of neutral employees as to whether they would leave the job if requested by the union, so as to put pressure on the primary employer, was not inducement and encouragement within the meaning of Section 8(b)(4)(i)(B) of the Act.[7/] The resolution here is even less interpretable as a "request or suggestion" that the union members refuse to perform services as there is no suggestion in the resolution that the contract would be enforced by proscribed economic action.

The Administrative Law Judge also found that Pasquinucci's statement to Carrier representatives on November 13, 1973, and Stack's statement to Contardi on July 19, 1974, both to the effect that moduline units would not be allowed into New York City, constituted violations of Section 8(b)(4)(ii)(B). We cannot adopt those findings. The statements were no more than reiteration of Respondent's position that it would not relinquish its rights under the collective-bargaining agreement. There is no suggestion that Respondnet would attempt to enforce the agreement by means other than those provided by the agreement. Consequently, we find that these statements do not constitute "threats, coercion or restraint" within the meaning of Section 8(b)(4)(ii)(B), and that Respondent's efforts to enforce its collective-bargaining agreement did not violate Section 8(e).[8/]

With regard to the filing of the grievance against General Sheet Metal in November 1974, our decision in Associated General Contractors, supra, requires

7/ Local 139, International Union of Operating Engineers, AFL--CIO, (Fox Valley Construction Material Suppliers Assn., Inc.) 182 NLRB 72 (1970).

8/ The Respondent contends that in any event these statements do not violate Sec. 8(b)(4)(ii)(B) as they are directed to the primary party to the dispute. For the reasons discussed infra, we find it unnecessary to reach the primary-secondary employer issues inasmuch as we find the Respondent has not engaged in coercive tactics proscribed by the Act.

a finding that Respondent did not violate Section 8(b)(4)(B) [9] and that the contract as so applied did not violate Section 8(e). [10] By instituting the grievance proceeding against General Sheet Metal, the Respondent merely "sought to enforce certain provisions of [its] bargaining agreement against a party to that agreement through peaceful means provided by the agreement and by no other means." [11] As the Board stated in Associated General Contractors at 700:

> [A] contractual agreement, such as we have before us, for compensation of a breach of contract determined by contractually fair procedures is a reasonable and peaceful method of resolving a dispute. Consequently, we find the Union's use of its contract in its dispute with Ohland did not constitute statutorily proscribed threats, coercion, or restraint.

As to the allegation that in violation of Section 8(h)(4)(i)(B) Respondent attempted to enforce its rights under the collective-bargaining agreements by inducing employees to refuse to perform work involving the Van Etten Drug Treatment

9/ The Administrative Law Judge found that the institution of the grievance proceeding constituted a violation of Sec. 8(b)(4)(B), following the reasoning of the Ninth Circuit Court of Appeals in Associated General Contractors of California, Inc., v. N.L.R.B., 514 F.2d 433 (C.A. 9, 1975). With all due respect to that court, we adhere to our decision in Associated General Contractors, 207 NLRB 698. The Administrative Law Judge also relies on Connell Construction Co., Inc., v. Plumbers & Steamfitters, Local 100, 421 U.S. 616 (June 2, 1975). That case is inapposite, inasmuch as it involved economic activity by a union to force a general contractor, whose employees it did not represent, to enter into a no-subcontracting agreement.

10/ The Administrative Law Judge found that the contract as written violated Sec. 8(e). No such violation was alleged. Moreover, we see no basis herein for making such a finding. We also disavow the Administrative Law Judge's discussion of purported violations of Sec. 8(e) based on events occurring more than 6 months prior to the filing of the unfair labor practice charges. Pursuant to Sec. 10(b) of the Act, these facts were not before the Administrative Law Judge for consideration as violations of the Act.

11/ Associated General Contractors of Calif., 207 NLRB 688, 699.

Center project, we conclude that the evidence is insufficient to sustain this contention. There is no direct evidence that union members employed by Three Boro were encouraged or induced by Respondent to refuse to perform services. Pasquinucci's response "That's so" to Contardi's query "I hear you have refused to let them sketch the job" was ambiguous, and cannot be interpreted as an admission that Respondent encouraged its members to refuse to work, since throughout this prolonged dispute Respondent has consistently relied on its contractual rights and remedies. Further, there is no evidence that Pasquinucci or any other agent of Respondent communicated to Johansmeyer, the employee who erased the sketches at that job, that he should engage in such conduct or any other conduct proscribed by Section 8(b)(4)(B).

The record also is devoid of evidence that Johansmeyer was an agent of the Respondent. It is well established that a union is not liable for the acts of its members in the absence of a principal-agent relationship. A union member's refusal to work, even though stemming from the union's position in a dispute with the employer, does not constitute a violation of Section 8(b)(4)(B) in the absence of evidence that the union is legally responsible for his conduct. [12]

As in Associated General Contractors and Kinstock Division, having found that Respondent has not resorted to the coercive tactics proscribed by the Act, we find it unnecessary to reach the secondary-primary employer and work preservation issues on which the Administrative Law Judge passed.

12/ International Brotherhood of Electrical Workers, Local No. 43, AFL--CIO (Executone of Syracuse, Inc.), 172 NLRB 621 (1968). See also Local Union No.], International Brotherhood of Electrical Workers, AFL--CIO (Forest Electric Corp.), 205 NLRB 1102 (1973).

In view of the foregoing, we shall dismiss the complaint in its entirety.

ORDER

It is hereby ordered that the complaint, as amended, be dismissed.

Dated, Washington, D.C. FEB 5 1976

Betty Southard Murphy, Chairman

John H. Fanning, Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD